85-307

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Estate of NELSON A. ROCKEFELLER, Deceased, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH and DONAL C. O'BRIEN, JR., Executors, and MARGARETTA F. ROCKEFELLER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000
Counsel for Petitioners

Of Counsel:
STUART E. KEEBLER
JOSEPH M. PERSINGER
JAMES EDWARD CLAPP
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, New York 10005

QUESTIONS PRESENTED

1. In permitting income tax deductions for expenses paid or incurred in a "trade or business," as defined to include "performance of the functions of a public office," did Congress intend that public officials should be denied business deductions that are allowed to employees in the private sector—here, the expenses of obtaining a new position in the taxpayer's established field of work?

2. Does this Court's decision in *McDonald* v. *Commissioner*, 323 U.S. 57 (1944), holding that the expenses of campaigning for election to public office are not deductible, bar deduction of expenses incurred in connection with confirmation of an appointment to public office?

3. Were the expenses incurred by former Governor Nelson A. Rockefeller in connection with confirmation of his appointment to the Vice Presidency, pursuant to the Twenty-Fifth Amendment to the Constitution, deductible as expenses incurred in carrying on his established trade or business as a governmental executive?

The names of all parties are set forth in the caption.

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Estate of Nelson A. Rockefeller, deceased, Laurance S. Rockefeller, J. Richardson Dilworth and Donal C. O'Brien, Jr., executors, and Margaretta F. Rockefeller, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 24, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 762 F.2d 264, 85-1 U.S. Tax Cas. (CCH) ¶ 9429, 56 A.F.T.R.2d (P-H) ¶ 85-5034 (2d Cir. 1985).

The opinion of the United States Tax Court is reported at 83 T.C. 368, TAX CT. REP. (CCH) Dec. 41,505, TAX CT. REP. DEC. (P-H) ¶ 83.24 (1984).

All citations in this petition will be to the opinions as reproduced in the Appendix hereto ("App.") at pages 1-17 and 19-32 respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 24, 1985. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XXV:

> SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
>
> SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
>
> SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
>
> SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice

President shall immediately assume the powers and duties of the office as Acting President.

* * * *

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(26) TRADE OR BUSINESS—The term "trade or business" includes the performance of the functions of a public office.

STATEMENT OF THE CASE

Facts

On August 20, 1974, President Ford, having recently assumed that office from the Vice Presidency, designated Nelson A. Rockefeller to fill the vacancy in the office of Vice President subject to congressional confirmation pursuant to Section 2 of the Twenty-Fifth Amendment to the Constitution. In his life-long career of public service in executive positions with both the state and federal governments, Mr. Rockefeller had most recently served for fifteen years as Governor of New York, followed by a short period of volunteer service as chair of two national commissions. The confirmation process lasted four months, and on December 19, 1974—exactly a year and a day after resigning as Chief Executive of New York State—Mr. Rockefeller was sworn in

as the second-ranking executive officer of the Nation. (App. 20-21.)

The confirmation process was intense and searching. Mr. Rockefeller underwent exhaustive investigations by several federal agencies and two congressional committees. He incurred expenses of $550,159.78 in responding to requests for documents and information from those agencies and committees, and in preparing memoranda and testimony for, and in testifying before, the committees. (App. 21.) Those expenses were incurred exclusively in connection with the process of confirmation following the selection of Mr. Rockefeller by the President; there is no question in this case as to any expenditures in seeking nomination or election to public office. In addition, respondent Commissioner of Internal Revenue makes no contention that Mr. Rockefeller's confirmation expenses were excessive or unreasonable. (*Id.*)

Proceedings in the Tax Court

This case came before the United States Tax Court on a timely petition under § 6213(a) of the Internal Revenue Code of 1954 ("I.R.C." or "Code"). Petitioners contended that Mr. Rockefeller's confirmation expenses should have been allowed as a deduction for income tax purposes under I.R.C. § 162(a), which provides for deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business," and § 7701(a)(26), which specifically defines "trade or business" to include "the performance of the functions of a public office."

The Tax Court rejected the petition, saying: "The principles of *McDonald* v. *Commissioner*, 323 U.S. 57 (1944), control." (App. 23.) In *McDonald*, this Court held that campaign expenses incurred by a judge seeking election to another term on the bench were not deductible. Although the *McDonald* Court made it clear that the business deductions provided by § 162(a) are fully available to public office holders by virtue of § 7701(a)(26), it adhered to the then-current view that § 162(a) was confined to expenses incurred

in performing a job, and did not apply to expenses incurred in attaining a new position in an established trade or business.

The Tax Court recognized that *McDonald* "involved an election, not a nomination-confirmation, and . . . may have been influenced by the sensitive policy problems that would arise from allowing deductions for election expenses." (App. 24.) The Tax Court also acknowledged that, in the 40 years since *McDonald* was decided, the Tax Court itself has judicially expanded the scope of § 162(a) so as to permit any employee in the private sector to deduct expenses incurred "in seeking new employment or a better job in a taxpayer's established field of work" as expenses of "carrying on his trade or business." (App. 25.) But the Tax Court refused to apply this rule to public officials who incur expenses in attaining a new position in public office—even where no election, and hence no campaign expenses, are involved. Feeling itself "constrained to follow the *McDonald* rule" (App. 24), the Tax Court rejected "the analogy between seeking new employment and seeking new political office." (App. 29.)

In reaching this result, the Tax Court construed § 7701(a)(26) of the Code as meaning that, as a matter of law, "the performance of the functions of *each* public office is a trade or business." (App. 29, emphasis supplied.) By this reasoning, Mr. Rockefeller's executive positions as Governor and Vice President were held to constitute different businesses as a matter of law, so that any expenses incurred in moving from the former position to the latter would be nondeductible by definition.

Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit affirmed the Tax Court, leaving undisturbed that Court's construction of § 7701(a)(26). It did so despite admitted uncertainty about the proper application of this Court's *McDonald* decision to the case:

> Almost all discussions of the problem here at issue begin, and many of them end, with *McDonald* v. *C.I.R.*, 323 U.S. 57 (1944), although in fact it sheds a most

uncertain light. . . . The bases for the decision are not altogether clear.

(App. 4-5.)

The Court of Appeals stated two grounds for its affirmance. First, it construed the eight-month hiatus between Mr. Rockefeller's service as Governor and his nomination as Vice President, during which Mr. Rockefeller was performing volunteer service as chair of two national commissions, as representing an abandonment of the trade or business established in his fifteen years as Chief Executive of the Nation's second most populous state. Second, the Court of Appeals accepted the Tax Court's conclusion that the Governorship and the Vice Presidency constitute separate trades or businesses, which the Court of Appeals characterized as a "finding" that it was "not . . . free to disturb." (App. 15.)

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD DECIDE THE IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER BUSINESS DEDUCTIONS PERMITTED TO EMPLOYEES IN THE PRIVATE SECTOR SHOULD BE DENIED TO PUBLIC OFFICIALS

A. This case concerns fundamental issues of wide-ranging impact

This is not a case about labyrinthine tax statutes of limited application. This case concerns construction, in the light of broad considerations of public policy, of two of the Internal Revenue Code's most basic provisions. The issues affect not only the taxpayer in this case, but all public officials at the federal, state, and local level. The opinions below raise the fundamental question of whether the Nation's income tax laws should be construed as applying unequally to private and public employees.

The concededly reasonable confirmation expenses at issue in this case were incurred by Mr. Rockefeller in the course of attaining a national executive office of the same general nature as the state executive office that he had recently vacated. It is now firmly established that the expenses of attaining a new position in "a taxpayer's established field of work" are deductible under § 162(a) of the Code as expenses of carrying on that "trade or business." (App. 25.) But in declining to disturb the Tax Court's holding that § 7701(a)(26) defines each public office as a separate "trade or business," the Court of Appeals left standing a construction of the Code that effectively denies this deduction to public officials.

Even if the decision in this case were confined to confirmation expenses, it would affect countless federal, state, and local employees every year. In 1984, at the federal level alone, the President sent 4,127 civilian nominations to the Senate, of which 4,001 were confirmed. 40 CONG. Q. ALMANAC 23-A (1985). While not every executive appointment subject to confirmation is to a position within the appointee's previous trade or business, it is by no means unusual for public servants to move from one position to another in the same field.

For example, in an exact analogy to Mr. Rockefeller's move from the highest executive position in New York State to the second highest in the Nation, Chief Judge Cardozo resigned his elective office as the highest judicial officer in New York State to serve, upon nomination of the President subject to confirmation, as an Associate Justice of this Court. *See* 259 N.Y. iii (1932) and 285 U.S. iii (1932). Although the Court below apparently believed that the question of deductibility of confirmation expenses in such a case has been left open (App. 17 & n.9), the Tax Court's undisturbed construction of § 7701(a)(26) rules out any possibility of deduction of such expenses even though the move is clearly from one position to another within the same business—"the business of judging." *McDonald* v. *Commissioner, supra,* 323 U.S. at 61.

This result is contrary to sound public policy. It is in the national interest that Congress have the fullest opportunity to scrutinize nominees for high office, even if, as in Mr. Rockefeller's case, the nominee may be put to great expense in meeting Congress's demands for documents and information. Moreover, potential nominees should not be discouraged from entering public service by the threat of excessive financial sacrifice. If the decision below were allowed to stand, the effect would be not only to discourage potential appointees from subjecting themselves to foreseeably complex confirmation proceedings, but also to hinder Congress in obtaining full information from those who allow themselves to be nominated.

But the impact of this case reaches far beyond the realm of federal, state, and local positions subject to confirmation. The construction of § 7701(a)(26) that led to the result below would prevent every public official at every level of government from deducting any expenses of any kind incurred in seeking or attaining a new position in an established field. Thus if this case is allowed to stand its effect will be to create a discriminatory tax structure affecting all public officials. Where no election contest is involved, there is no rational basis—and certainly no statutory basis—for denying public servants deductions to which they would have been entitled in the private sector.

This important and far-reaching issue of discrimination between public and private employees in the application of the Internal Revenue Code should be resolved by this Court.

B. The discriminatory application of Code provisions mandated by the decision in this case is contrary to the intent of Congress

The purpose of I.R.C. § 7701(a)(26), defining "trade or business" to include "the performance of the functions of a public office," is to ensure that public officials will have available the same deductions under § 162(a) as they would have if they were engaged in a trade or business in the private sector. *See* App. 4 n.2; *McDonald* v. *Commissioner, supra,*

323 U.S. at 59-60. One of the kinds of expense that is now universally recognized as deductible for employees in the private sector under § 162(a) is expense incurred in obtaining a new job in the employee's established trade or business. As the Tax Court said over a decade ago:

> It is now a settled proposition of law in this Court that expenses incurred in either seeking or securing new employment within the taxpayer's established field are deductible.

Black v. *Commissioner*, 60 T.C. 108, 113 (1973). Any lingering opposition to this principle on the part of the Commissioner was abandoned in Rev. Rul. 75-120, 1975-1 C.B. 55.

Of course, the deduction is not available if the new position is in a new trade or business. But "a change of duties does not constitute a new trade or business if the new duties involve the same general type of work . . . ." Treas. Reg. § 1.162-5(b)(3). Thus a taxpayer in the "trade or business of being a corporate executive" was permitted to deduct fees paid to an executive search firm that found him an executive position with a different corporation. *Primuth* v. *Commissioner*, 54 T.C. 374, 379 (1970), *acq.*, 1972-2 C.B. 2. Likewise, a taxpayer "in the trade or business of being an 'administrator' " was allowed a deduction for expenses incurred in seeking similar employment with a different firm. *Cremona* v. *Commissioner*, 58 T.C. 219, 222 (1972), *acq.*, 1975-1 C.B. 1.

Under the settled principles just described, if the chief executive of a local corporation were to move up the career ladder to a new position as vice president of a nation-wide firm, he would obviously still be in the same "trade or business of being a corporate executive" under *Primuth*, and thus entitled to deduct the expenses incurred in obtaining his new position under § 162(a). But under the interpretation of § 7701(a)(26) promulgated by the Tax Court and affirmed by the Court of Appeals in this case, Mr. Rockefeller's precisely analogous move from state to federal level as a governmental executive is *defined* as a change of "trade or business" which

precludes any deduction of expenses under § 162(a). In this way § 7701(a)(26) is construed so as to produce a result directly contrary to that for which it was intended: Rather than ensuring the availability of business deductions to public office holders, the statute serves to deny such deductions.

The Court of Appeals erred in characterizing as a "finding," which it was "not . . free to disturb" on appeal, the Tax Court's conclusion that the Governorship and the Vice Presidency constitute separate trades or businesses. That conclusion flowed from the Tax Court's interpretation of § 7701(a)(26) as meaning that, as a matter of law, each public office is a distinct trade or business. (App. 29.) The Court of Appeals' decision cannot be supported on a theory of deference to a tribunal better situated to resolve issues of fact, since all the facts in this case were stipulated. What the Appellate Court deferred to was the Tax Court's legal interpretation of § 7701(a)(26) as mandating a result directly contrary to Congress's intent. That was an error of law by the Tax Court, erroneously affirmed by the Court of Appeals.

Nor can the Court of Appeals' affirmance be justified by its declaration that the eight-month hiatus between the Governorship and the nomination to the Vice Presidency terminated Mr. Rockefeller's career as a governmental executive. (App. 14.) Mr. Rockefeller's volunteer activity during that brief period kept him in view and positioned him to assume national executive office when it became available; it did not in any sense constitute an abandonment of his lifelong career of public service, or divest him of his "trade or business" as a governmental executive established through fifteen years of continuous service as Governor. The Commissioner himself has ruled that where an individual has left one position and not yet taken a new one, "his trade or business would consist of the services previously performed for his past employer if no substantial lack of continuity occurred between the time of the past employment and the seeking of the new employment." Rev. Rul. 75-120, *supra*, 1975-1 C.B. at 56. And the courts have held that a reasonable period of a

year or more of non-employment will not terminate an established trade or business. *Primuth* v. *Commissioner, supra,* 54 T.C. at 378.

Had the Courts below not adopted a legal construction of § 7701(a)(26) under which every public office is defined as a different trade or business, they could not have failed to observe that the duties of a governor and of the Vice President "involve the same general type of work," so that the Vice Presidency "does not constitute a new trade or business" for a former governor. Treas. Reg. § 1.162-5(b)(3).

The Tax Court has pointed out that the Vice President "stands by to succeed the President," "holds the position of President of the Senate," "serves as alter ego for the President," and "has, in recent years, carried a heavy load of responsibilities in the administration of the executive branch of the Government." (App. 27.) As Congress noted in its consideration of the proposed Twenty-Fifth Amendment, the Vice President "has come to share and participate in the executive functioning of our Government." H.R. REP. NO. 203, 89th Cong., 1st Sess. 15 (1965); S. REP. NO. 66, 89th Cong., 1st Sess. 14 (1965). And Sections 3 and 4 of the Twenty-Fifth Amendment provide for the Vice President to serve formally as Acting President during times of Presidential incapacity, as Vice President Bush recently did while President Reagan was undergoing surgery. *See* Letters from President Reagan to the President Pro Tempore of the Senate and the Speaker of the House, 21 WEEKLY COMP. PRES. DOC. 902 (July 13, 1985). All of these actual and potential executive responsibilities entail the same skills as being governor of a state.

In short, just as President Reagan, and before him Presidents Carter and Franklin D. Roosevelt, established themselves in the field of being a high governmental executive by serving as Governors of California, Georgia, and New York, it was Mr. Rockefeller's experience as Chief Executive of New York State that qualified him to participate in, and if necessary to take over, the duties of Chief Executive of the United States.

Since the decision below not only deprives Mr. Rockefeller of the deduction to which he was entitled, but also affirms a construction of § 7701(a)(26) that would deprive all public officials of deductions under § 162(a) to which they would be entitled if they were employed in the private sector, in direct contravention of the purpose of § 7701(a)(26), this Court should review the decision below in order to reassert the will of Congress on a matter of importance to public officials at every level of the federal system of government.

II

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *McDONALD* v. *COMMISSIONER*

The Tax Court stated that its decision in this case was mandated by this Court's decision in *McDonald* v. *Commissioner, supra,* 323 U.S. 57 (1944). (App. 23, 24.) The Court of Appeals considered at some length the wide diversity of interpretations to which *McDonald* has been subject over the years, and evinced considerable perplexity as to the applicability of *McDonald* to this case. (App. 4-8.) Nevertheless, it affirmed the Tax Court.

The Court of Appeals' uncertainty about *McDonald* is understandable since there was no majority opinion in that case (the 4-4 tie was broken by one Justice who concurred in the result without opinion), and since, as the Court of Appeals pointed out, in the 40 years since the decision was rendered "[t]he Supreme Court has not had subsequent occasion to revisit the field plowed in *McDonald.*" (App. 6.) In order to remove the uncertainty that has grown up over 40 years about that important case, this Court should take the present occasion to "revisit" *McDonald* in light of subsequent developments in the law, and provide guidance to the lower courts as to its contemporary meaning.

Such a review of *McDonald* will reveal one crucial point, at least, upon which there was no dissent: The Court held that under § 48(d) of the Internal Revenue Code—now § 7701(a)(26)—Judge McDonald was "entitled to deduct

from his gross income *all* the 'ordinary and necessary expenses' paid during 1939 in carrying on [his] 'trade or business.'" 323 U.S. at 59-60 (emphasis supplied). In other words, this Court held—exactly as Congress intended—that what is now § 7701(a)(26) gives public officers like Judge McDonald the right to deduct any business expenses that would be deductible to anyone else under what is now § 162(a). Since the decision in this case construes § 7701(a)(26) so as to deny to Mr. Rockefeller and all other public officials a class of deductions allowed to employees in the private sector under § 162(a), it is in direct conflict with this Court's decision in *McDonald*.

When *McDonald* was decided the expenses of attaining a new position within a taxpayer's established trade or business were not regarded as expenses of carrying on that trade or business under § 162(a), and thus were viewed by this Court as nondeductible for private employees and public officials alike. Now that the Commissioner and the courts agree that such expenses are deductible for private employees, however, *McDonald*'s construction of the language of § 7701(a)(26) renders such deductions available to public officials as well, at least where no election expense is involved.

The Court in *McDonald* was divided on the question whether a candidate's expenditures on his own election campaign should be regarded as nondeductible as a matter of public policy. That issue, however, is irrelevant here, since this case does not involve election expenses, and the policy considerations that militate against deductibility of such expenses (*e.g.*, concern that unequal tax subsidies might favor one candidate over another) do not apply to confirmation proceedings.

The Tax Court in this case alluded to the fact that the office of Vice President is "political in nature." (App. 27.) That, of course, is true of public offices generally. But this Court's construction of § 7701(a)(26) in *McDonald*—as extending to public officials (including elected judges) all the "trade or business" deductions available to employees in the private sector under § 162(a)—corrects any notion that

holders of "political" office should be excluded from the benefits of § 162(a). As the Court of Appeals in another Circuit noted recently, "[t]he distinction between business and political activities . . . is illogical . . . where the taxpayer's 'business' is politics." *Diggs* v. *Commissioner*, 715 F.2d 245, 250 (6th Cir. 1983).

The fact that the Courts below reached a result that is in direct conflict with *McDonald*—and did so, moreover, in the belief that this erroneous result was mandated by *McDonald*—shows the need for this Court, once again, to grant certiorari in order "to give a definitive judicial answer to an important problem in the administration of the federal income tax." *McDonald* v. *Commissioner, supra,* 323 U.S. at 59.

CONCLUSION

A writ of certiorari should issue to review the judgment below.

Respectfully submitted,

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000
Counsel for Petitioners

Of Counsel:
STUART E. KEEBLER
JOSEPH M. PERSINGER
JAMES EDWARD CLAPP
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, New York 10005

August 22, 1985

APPENDIX

Opinion of the United States Court of Appeals For the Second Circuit

No. 1041 — August Term, 1984

(Argued: April 22, 1985 Decided: May 24, 1985)

Docket No. 84-4182

Estate of Nelson A. Rockefeller, Deceased, Laurance S. Rockefeller, J. Richardson Dilworth and Donal C. O'Brien, Jr., Executors and Margaretta F. Rockefeller,

Appellants.

—against—

Commissioner of Internal Revenue,

Appellee.

Before:

Feinberg, *Chief Judge*, and Friendly and Newman, *Circuit Judges.*

Appeal by the Estate of Nelson A. Rockefeller from a decision of the Tax Court, 83 T.C. 368 (1984), Featherston, J., holding that expenses incurred by Mr. Rockefeller in connection with his confirmation as Vice President were not deductible in determining his net income for 1974. Affirmed.

William E. Jackson, New York, New York (Stuart E. Keebler, Joseph M. Persinger, Milbank, Tweed, Hadley & McCloy, New York, New York), *for Appellants.*

Glenn L. Archer, Jr., Assistant Attorney General, Washington, D.C. (Michael L. Paup, Richard Farber, Bruce R. Ellisen, Attorneys, Tax Division, Department of Justice, Washington, D.C.), *for Appellee.*

FRIENDLY, *Circuit Judge*:

This appeal by the Estate of Nelson A. Rockefeller and his widow[1] from a decision of the Tax Court, 83 T.C. 368 (1984), Featherston, J., presents a new variation on the old theme of what constitutes "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business," I.R.C. § 162(a), which are deductible in determining net income. Appellants contended that expenses incurred by Mr. Rockefeller in connection with the confirmation by the Senate and the House of Representatives, pursuant to the Twenty-Fifth Amendment, of his nomination to be Vice President of the United States were such expenses. The Commissioner of Internal Revenue denied this, the Tax Court agreed, and this appeal followed. We affirm.

The case arises as follows: Mr. Rockefeller incurred expenses of $550,159.78 in connection with the confirmation hearings in 1974, primarily for legal and other professional services. The Commissioner does not contend that the expenses were excessive or unreasonable in relation to the services rendered. In their joint income tax return for 1974, which showed a gross income of $4,479,437, Mr. and Mrs. Rockefeller claimed a deduction of $[illegible],275—an amount of these expenses equal to his

[1] Mrs. Rockefeller's involvement arises solely because she and Mr. Rockefeller filed a joint return.

salary as Vice President during the year. When the Commissioner of Internal Revenue disallowed this deduction, Mr. Rockefeller's estate and Mrs. Rockefeller petitioned for review by the Tax Court and asserted that the entire amount of $550,159.78 was deductible as expenses of the trade or business of "performing the functions of public office."

The case was submitted on a rather meagre stipulation of facts which cited only Mr. Rockefeller's tenure as Governor of New York State between January 1959 and December 1973, when he resigned to devote his full time to the Commission on Critical Choices for Americans (1973-74) and the National Commission on Water Quality (1973-74), as showing the trade or business in which Mr. Rockefeller had engaged. However, copies of the hearings before and the reports of the Senate and House Committees on his nomination as Vice President were attached to the stipulation, and the Tax Court's opinion lists other positions held by Mr. Rockefeller referred to in these hearings, as follows: Coordinator of Inter-American Affairs (1940-44), Assistant Secretary of State for American Republic Affairs (1944-45), Chairman of the Presidential Advisory Board on International Development (1950-51), Undersecretary of Health, Education and Welfare (1953-54), and Special Assistant to the President for International Affairs (1954-55). 88 T.C. at 374-75.

Discussion

Decision turns on the interpretation of the familiar provision of I.R.C. § 162(a), going back to the Revenue Act of 1918, which allows as a deduction

> all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Also relevant is I.R.C. § 7701(a)(26), adopted as § 48(d) of the Revenue Act of 1934, 48 Stat. 680, 696, ch. 277, which says:

> The term 'trade or business' includes the performance of the functions of a public office.[2]

Almost all discussions of the problem here at issue begin, and many of them end, with *McDonald* v. *C.I.R.*, 323 U.S. 57 (1944), although in fact it sheds a most uncertain light. McDonald had been appointed to serve an unexpired term as judge on a Pennsylvania court, carrying an annual salary of $12,000, with the understanding that he would be a contestant in the ensuing primary and general elections for a full term of ten years. To obtain

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[2] The Senate and Conference Committee Reports describe this addition as "clerical" and "declaratory of existing law," S. Rep. No. 558, 73d Cong., 2d Sess. at 29; H.R. Rep. No. 1385, 73d Cong., 2d Sess. at 17 (Conference Report) (1934). A discussion before the Senate Committee on Finance suggests that the primary reason for the provision was to overcome doubts whether Senators were engaged in a "trade or business" so as to permit deduction for extra staff and telephone expenses. 1 Hearings before Committee on Finance on H.R. 7835, 73d Cong., 2d Sess. (March 6, 1934), p. 29-30. The Ninth Circuit has said that § 48(d) was adopted to modify the general rule that "in order for an activity to be considered a trade or business under Section 162 it must be engaged in for profit." *Frank* v. *United States*, 577 F.2d 93, 95 (9 Cir. 1978). The court cited *Jackling* v. *C.I.R.*, 9 B.T.A. 312, 320 (1927), as the "best statement of the [existing] law" with respect to public officers, which the amendment was said to have codified. In *Jackling*, the Board of Tax Appeals allowed business deductions by a war-time government employee whose salary was only one dollar a year and rejected the Commissioner's argument that the expenses were not deductible because the taxpayer's employment was not profit motivated. Further support for this reading of § 48(d) can be found in Revenue Ruling 55-109, 1955-1 Cum. Bul. 262 (1955), in which the Commissioner interpreted the section as allowing a public office to be treated as a trade or business "even though the incumbent thereof may serve without compensation, a factor which is ordinarily regarded as a prerequisite to the pursuit of a trade or business."

the support of his party organization, he was forced to pay an "assessment" of $8,000, which was to be used for the support of the entire ticket; he spent an additional $5,017.27 for expenses of his own campaign. The Commissioner disallowed the deduction of both amounts. The Tax Court affirmed, 1 T.C. 738 (1943), as did a sharply divided Supreme Court.[3] The bases for the decision are not altogether clear. At one point Justice Frankfurter emphasized that McDonald's "campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." 323 U.S. at 60. Perhaps fearing that this being-becoming distinction would cut too widely, Justice Frankfurter elaborated other factors. One was that allowance of a deduction for the assessments paid by McDonald would lead to deductions by persons who were not candidates but paid "such 'assessments' out of party allegiance mixed or unmixed by a lively sense of future favors," *id.*, a proposition which would not necessarily follow and which in any event would not explain the disallowance of McDonald's own campaign expenses. This was followed by a sentence, again emphasizing the being-becoming distinction but with a different thought added for good measure, 323 U.S. at 60-61:

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[3] Justice Frankfurter delivered a plurality opinion for himself, Chief Justice Stone and Justices Roberts and Jackson. Justice Rutledge concurred in the result. Justice Black dissented for himself and Justices Reed, Douglas and Murphy. It may not be altogether accidental that three of the dissenters had held elective office, an experience not shared by any member of the plurality.

It should be noted that the dissenters did not disagree with the plurality's conclusion that the amounts were not "ordinary and necessary expenses of a trade or business"; they argued rather that the expenses came within what is now § 212(1), adopted in 1942 to overrule *Higgins* v. *C.I.R.*, 312 U.S. 212 (1941), which allowed deduction of "the ordinary and necessary expenses [of an individual] paid or incurred . . . for the production or collection of income."

> To determine allowable deductions by the different internal party arrangements for bearing the cost of political campaigns in the forty-eight states would disregard the explicit restrictions of § 23 confining deductible expenses solely to outlays in the efforts or services—here the business of judging—from which the income flows. Compare *Welch* v. *Helvering*, 290 U.S. 111, 115-116.

After disposing of arguments based on what are now I.R.C. § 165 and § 212(1), he continued with some observations concerning the increased public hostility to campaign contributions by "prospective officeholders, especially judges," and then concluded on two notes. One was that, 323 U.S. at 63-64:

> To find sanction in existing tax legislation for deduction of petitioner's campaign expenditures would necessarily require allowance of deduction for campaign expenditures by all candidates, whether incumbents seeking reelection or new contenders. To draw a distinction between outlays for reelection and those for election—to allow the former and disallow the latter—is unsupportable in reason. It is even more unsupportable in public policy to derive from what Congress has thus far enacted a handicap against candidates challenging existing officer holders. And so we cannot recognize petitioner's claim on the score that he was a candidate for reelection.

(footnote omitted). The other was the desirability of according special deference to the Tax Court's determination on a matter of the sort *sub judice*, *id.* at 64-65. The Supreme Court has not had subsequent occasion to revisit the field plowed in *McDonald*.

The courts have echoed the various themes sounded in *McDonald*. Some decisions have stressed the being-becoming distinction; *see, e.g., Diggs* v. *C.I.R.*, 715 F.2d 245, 250 (6 Cir. 1983). Others have emphasized the policy argument against deduction of campaign expenses, namely, that allowing such deductions would involve the whole community in partial subsidization of the electoral expenses of a particular candidate—a subsidy that would pay a larger amount of the campaign expenses of high than of low bracket candidates. *See, e.g., James B. Carey*, 56 T.C. 477, 479-81 (1971), *aff'd per curiam*, 460 F.2d 1259 (4 Cir.), *cert. denied*, 409 U.S. 990 (1972). The appellants distinguish the latter cases, stressing that the expenses here at issue were not incurred in an election in which Mr. Rockefeller was pitted against another citizen but in a confirmation in which he was the only candidate.[4] However, the policy argument in *McDonald* is only dubiously applicable to *Campbell* v. *Davenport*, 362 F.2d 624, 626 (5 Cir. 1966), *Nichols* v. *C.I.R.*, 511 F.2d 618 (5 Cir.) (en banc), *cert. denied*, 423 U.S. 912 (1975), and *Levy* v. *United States*, 535 F.2d 47 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976), disallowing the deduction of small qualification fees payable by any candidate to his party to help to defray the costs of conducting the primary election and of which "[n]o part . . . was used

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[4] The force of this distinction between election and confirmation expenses is debatable. Mr. Rockefeller's expenses included not simply amounts incurred in preparing answers to questions of Senators and Representatives but also amounts incurred, with entire propriety, in convincing Congress that he was a good selection for Vice President. *Nomination of Nelson A. Rockefeller to be Vice President of the United States: Hearings before the House Comm. on the Judiciary*, 93d Cong., 2d Sess., pp. 1-3 (1974). While Mr. Rockefeller was not in direct contest with anyone, others were waiting in the wings if Congress was not so convinced. For reasons developed below, we are not required to pass on the force of the distinction.

to espouse the causes of party candidates in the general election." *Nichols, supra*, 511 F.2d at 619. Further support for the Commissioner's position can be found in *Joseph W. Martino*, 62 T.C. 840, 844 (1974), disallowing deduction of legal fees incurred by a successful primary candidate in defending his victory against an election contest suit filed by his opponent; Martino, like Mr. Rockefeller, was not seeking the suffrage of the people as against another candidate.

Appellants' principal argument is that a post-*McDonald* decision of the Tax Court, in which the Commissioner has acquiesced, *David J. Primuth*, 54 T.C. 374 (1970), has undermined the being-becoming distinction. Primuth, the secretary-treasurer of a small corporation, Foundry Allied Industries, enlisted the aid of a "head-hunter" organization to find him a better job. This work resulted in his employment as "secretary-controller" of a company with greater geographical scope. The Tax Court held that the fees and expenses paid to the head-hunter organization were deductible under I.R.C. § 162.

Judge Sterrett's opinion for a plurality took off from the proposition that "a taxpayer may be in the trade or business of being an employee, such as a corporate executive or manager," 54 T.C. at 377, rather than or in addition to the trade or business of holding a particular job, citing numerous cases including our own *Hochschild* v. *C.I.R.*, 161 F.2d 817 (1947). With that established, Judge Sterrett believed that "the problem presented . . . virtually dissolve[d] for it is difficult to think of a purer business expense than one incurred to permit such an individual to continue to carry on that very trade or business—albeit with a different corporate employer." 54 T.C. at 379. However, he proceeded to emphasize the relatively narrow scope of the decision, *id.*:

> Furthermore, the expense had no personal overtones, led to no position requiring greater or different qualifications than the one given up, and did not result in the acquisition of any asset as that term has been used in our income tax laws. It was expended for the narrowest and most limited purpose. It was an expense which must be deemed ordinary and necessary from every realistic point of view in today's marketplace where corporate executives change employers with a noticeable degree of frequency. We have said before, and we say again, that the business expenses which an employee can incur in his own business are rare indeed. Virtually all his expenses will be incurred on behalf of, and in furtherance of, his corporate employer's business. What we have here, however, is an exception to that rule.

(footnote omitted). Judge Tannenwald, joined by three other judges, concurred: they were concerned over the "subtle distinctions" which they saw developing in the deduction of employment agency fees and suggested that "everyday meaning" should be the touchstone in interpreting § 162. 54 T.C. at 382. In a separate concurring opinion, Judge Simpson took issue with language in the plurality opinion which he feared might confine the decision to cases where the taxpayer actually secured a new job. *Id.* at 383. Judge Featherston's concurrence placed greater weight on a Revenue Ruling that explicitly "allow[ed] deductions for fees paid to employment agencies for securing employment." *Id.* at 384. Six judges dissented. The Department of Justice rejected the Commissioner's request for an appeal and the Commissioner acquiesced in the result, 1972-2 Cum. Bul. 2 (1972).

In *Leonard F. Cremona*, 58 T.C. 219 (1972), a majority of the Tax Court rejected an attempt by the Commissioner to contain *Primuth* to cases where the employee had in fact obtained a new position. Again the Department of Justice declined a request to appeal and the Commissioner acquiesced, 1975-1 Cum. Bul. 1 (1975).

However, the erosion of the being-becoming distinction effected by *Primuth* and *Cremona* and the Commissioner's acquiescence in these decisions was partial only. The Tax Court, with the approval of the courts of appeals, has limited deductibility to cases where the taxpayer was seeking employment in the *same* trade or business. Moreover, the courts have insisted on a high degree of identity in deciding the issue of sameness.[5] Thus, in *William D. Glenn*, 62 T.C. 270 (1974), the court found that the broader scope of activities permitted in Tennessee to certified public accountants as compared with public accountants made the former a new trade or business and, in consequence, that the expense of taking a review course designed to assist the taxpayer in qualifying for certification was not deductible. Similarly, being a registered pharmacist constitutes a different trade or business than being an intern pharmacist, so that expenses of attending courses on pharmacology were not deductible, *Gary Ant-*

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[5] Most of these cases concerned education expenses, as to which there is a regulation, Treas. Reg. § 1.162-5 (1960). This elaborates on the statute by defining a specific type of deductible expenses, § 1.162-5(a)(2), and by prohibiting the deduction of expenses incurred in order to attain minimum educational requirements for a position, § 1.162-5(b)(2), and expenses for a program of study leading to qualification in a new trade or business, § 1.162-5(b)(3). However, the Tax Court cites education cases in decisions regarding other types of expenses incurred in obtaining a new position, *see, e.g., Primuth, supra*, 54 T.C. at 378; *Joseph Sorin Schneider*, T.C. Memo. 1983-753 (1983).

zoulatos, T.C. Memo. 1975-327 (1975).[6] In *Joel A. Sharon*, 66 T.C. 515 (1976), *aff'd*, 591 F.2d 1273 (9 Cir. 1978), *cert. denied*, 442 U.S. 941 (1979), the Tax Court disallowed an IRS attorney's deductions for expenses related to taking the California bar examination. The court found that these expenditures would permit the taxpayer to engage in the new "trade or business" of the general practice of law in the State of California. The Ninth Circuit agreed with the Tax Court's reasoning that private practice involved "significantly different tasks and activities" from those required of an IRS lawyer, 591 F.2d at 1275. *See*, to the same effect, *Joseph J. Vetrick*, T.C. Memo. 1978-83 (1978), *aff'd*, 628 F.2d 885 (5 Cir. 1980). The Tax Court has also disallowed a deduction for helicopter training expenses by an airline pilot. *Edward C. Lee*, T.C. Memo. 1981-26 (1981), *aff'd on other grounds*, *Lee* v. *C.I.R.*, 723 F.2d 1424 (9 Cir. 1984). The court found that "a helicopter pilot is in a different trade or business than is an airline pilot" and, since the taxpayer flew only fixed-wing aircraft in his current employment, "the helicopter flight training [led] to Mr. Lee's qualification in a new trade or business." *Joseph Sorin Schneider*, *supra*, T.C. Memo. 1983-753 (1983), denied a deduction sought by a taxpayer who had resigned from the U.S. Army with a captain's commission and who later, after graduation, entered the business world as a consultant, for amounts spent in applying to graduate schools, in getting the graduate degrees of M.B.A. and M.P.A. at Harvard, and in seeking a summer job in Europe. The court said that the taxpayer's business had been that of an Army officer and rejected his claim that he had been in the business of

[6] Although the court quoted Treas. Reg. § 1.162-5, including the minimum educational requirement, § 1.162-5(b)(2), it did not base its decision upon that section.

being a "manager"—a claim strongly resembling the one made here that Mr. Rockefeller was in the business of being "a governmental executive."[7] In *Roger Eugene Evans*, T.C. Memo. 1981-413 (1981), the court denied a deduction for job seeking expenses to a taxpayer who had been in the Air Force for 22½ years and had risen to the rank of Lieutenant Colonel and the post of special assistant to the commander of an Air Force base. The court was convinced that "petitioner's service as an Air Force officer cannot be compared to any employment he might have obtained outside the Air Force" and that while he "undoubtedly sought employment that would utilize the skills he had acquired during his military career, he [had] failed to show that there would not be substantial differences between the employment he sought to obtain in the private sector and his service as an Air Force officer." In sum, the Tax Court's decisions have adopted what Judge Tannenwald, in his concurring opinion in *Primuth*, characterized as "the simple test of comparing the position which the taxpayer occupied before and after the change," 54 T.C. at 382, and conform to the statement in *Kenneth C. Davis*, 65 T.C. 1014, 1019 (1976), that "[i]f substantial differences exist in the tasks and activities of various occupations or employments, then each such occupation or employment constitutes a separate trade or business."

Appellants' brief uses a number of different phrases to describe Mr. Rockefeller's trade or business at the time

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[7] The court distinguished *Stephen G. Sherman*, T.C. Memo. 1977-301 (1977), which had allowed deduction of expenses of attending the Harvard Business School by a taxpayer who had been employed as a civilian by the Army and Air Force Exchange Service as chief of its Plans and Programs office and, after graduating and applying unsuccessfully for reinstatement to his former job, was hired by private industry as a director of planning and research.

of his nomination to be Vice President—"an executive in federal and state governments" (p. 8); "an executive in public office" (p. 8); "an executive in public service" (p. 17); and "a governmental executive" (p. 22). In fact, the only public posts Mr. Rockefeller held at the time of his nomination were the chairmanships of two commissions, posts in which he had no executive duties. One of these, the National Commission on Water Quality was created by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, to review water pollution control methods and issue a report to Congress recommending modifications. Although Mr. Rockefeller was elected chairman by the other members when he joined the Commission while still Governor of New York, the record reveals almost nothing about his activities there. The Commission on Critical Choices for Americans was an idea of Mr. Rockefeller's. It was not a governmental body, although its membership included some members of Congress and of the executive branch. Since federal funding was denied, the Commission was funded from private sources and foundation grants. If only these two activities were to be considered, it would be plain beyond all argument that holding the chairmanship of these Commissions and being Vice President are not the same trade or business but rather separate trades or businesses, if indeed membership on the commissions, particularly the Commission on Critical Choices, was a trade or business at all.[8]

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[8] The members of the Commission on Water Quality who were not officers or employees of the United States were paid by the Government on a *per diem* basis, 33 U.S.C. § 1325(f); it does not appear whether Mr. Rockefeller accepted such payments, at least for the period when he was Governor of New York. The record is silent with respect to what salary, if any, was paid to Mr. Rockefeller as Chairman of the Commission on Critical Choices for Americans.

However, a taxpayer who is unemployed when the expenses are incurred is "viewed as still engaged in the business of providing the type of services performed for [his] prior employer, unless 'there is a substantial lack of continuity between the time of [the employee's] past employment and the seeking of the new employment.'" 1 Bittker, Federal Taxation of Income, Estates and Gifts § 20.4.6, at 20-85 to 20-86 (1981), *quoting* Rev. Rul. 75-120, 1975-1 Cum. Bul. 55, at 56; *see*, 4A Mertens, The Law of Federal Income Taxation § 25.08, at 33 (1985) (taxpayer's "trade or business [does] not cease to exist during a reasonable period of transition"). *See also Stephen G. Sherman*, *supra*, T.C. Memo. 1977-301. Appellants urge that this principle allows us to look to Mr. Rockefeller's fifteen years of service as Governor of New York in considering whether the confirmation expenses on his nomination to be Vice President were in connection with the continuation of the same trade or business. We disagree, for two reasons. In order to take advantage of what is called the "hiatus" principle, a taxpayer must at least show that during the hiatus he intended to resume the same trade or business. *See Sherman*, *supra*, T.C. Memo. 1977-301. There is no such showing here. Mr. Rockefeller clearly did not intend to run again for Governor after having resigned that office after holding it for fifteen years. Indeed, the stipulation states that Mr. Rockefeller resigned the governorship "to devote his full time to the Chairs" of the two commissions, and there is nothing to suggest that he was contemplating holding executive public office again. The Vice Presidency became available only due to the resignation of President Nixon in the summer of 1974—an event that was not foreseeable until shortly before it occurred. We also cannot fault the Tax Court's holding that being governor of the second most populous state in the union and being

Vice President of the United States are not the same trade or business in the narrow sense in which sameness has been consistently characterized. While there are certain areas of overlap, the governorship entails many duties—enforcement of the laws of the state, developing and promoting new laws, supervising a multitude of departments and agencies having thousands of employees and spending billions of dollars, proposing and securing the passage of a budget and the revenues needed to meet it, making appointments, and lobbying for the interests of the state with the Federal Government—which either find no counterparts in the Vice Presidency or find them only to the extent, usually quite limited, which the President has directed. On the other hand, the Vice Presidency involves many duties not found in the governorship of New York—presiding over the Senate, acting on behalf of the President on ceremonial occasions both within and without the United States, and executing special assignments by the President—not to speak of the Vice President's most important task, readying himself for the possibility of assuming the Presidency on a moment's notice. Although positions with somewhat different duties and responsibilities may be found to be within the same trade or business, whether in public or private employment, the Tax Court's finding that the Vice Presidency involved a trade or business for Mr. Rockefeller different from any in which he was engaged at the time of his nomination is not one that we are free to disturb, *see* I.R.C. § 7482(a).

Appellants ask us to take a still broader view and consider Mr. Rockefeller as having been engaged in the same trade or business since his appointment as Coordinator of Inter-American Affairs in 1940. But the cases do not recognize a definition of "trade or business" wide enough to bring all Mr. Rockefeller's various posts within it.

While there might be sufficient resemblance and continuity between the posts of Coordinator of Inter-American Affairs which Mr. Rockefeller held between 1940 and 1944 and that of Assistant Secretary of State for American Republic Affairs which he held between 1944 and 1945 to have qualified him as being in the business of being a public servant with special interest and expertise in Latin America, we see little resemblance between these positions and his service as Undersecretary of Health, Education and Welfare in 1953 and 1954 or as Governor of New York between 1959 and 1973. Furthermore there are substantial gaps between Mr. Rockefeller's various posts —five years between 1945 and 1950, one and one-half years between 1951 and 1953, three years between 1955 and 1958—far longer than the "hiatus" theory would recognize. *See, e.g., Canter* v. *United States*, 354 F.2d 352 (Ct. Cl. 1965) (taxpayer who discontinued nursing activities for more than four years held not to retain status of being in the trade or business of nursing); *Peter G. Corbett*, 55 T.C. 884 (1971). *See also* Rev. Rul. 68-591, 1968-2 Cum. Bul. 73 (1968) ("Ordinarily, a suspension [of employment] for a period of a year or less, after which the taxpayer resumes the same . . . trade or business, will be considered temporary"). Our reading of the record shows Mr. Rockefeller as a distinguished and public-spirited citizen, ready, for a third of a century, to put his great abilities at the disposal of the government in both appointive and elective office. While he was, of course, entitled to deduct unreimbursed expenses incurred in performing the functions of any of the many offices he held, I.R.C. § 7701(a)(26), the Tax Court was warranted in holding that he had not engaged in any trade or business comparable to the Vice Presidency, within the rather narrow sense which the courts have reasonably given to the concept of identity. We therefore have no occasion

to decide whether the "policy" reasons underlying the decisions disallowing expenses incurred in elections apply to expenses incurred in seeking confirmation to an appointive office which would seem to be properly regarded as the same trade or business,[9] or whether if they generally do not, there are special considerations for applying them to the unusual bicameral confirmation required by the Twenty-Fifth Amendment which the Commissioner characterizes as the equivalent of an election.

The judgment of the Tax Court is affirmed.

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[9] *E.g.*, a judge of a federal district court nominated to a court of appeals, a judge of a state court nominated to a federal court, or a foreign service officer nominated to be an ambassador.

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and eighty-five.

Present: Hon. WILFRED FEINBERG, *Chief Judge*
Hon. HENRY J. FRIENDLY,
Hon. JON O. NEWMAN,
Circuit Judges,

ESTATE OF NELSON A. ROCKEFELLER, Deceased, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH and DONAL C. O'BRIEN, JR., Executors, and MARGARETTA F. ROCKEFELLER, *Appellants,* v. COMMISSIONER OF INTERNAL REVENUE, *Appellee.*	84-4182

Appeal from the United States Tax Court.

This cause came on to be heard on the transcript of record from the United States Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the United States Tax Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellants.

ELAINE B. GOLDSMITH,
Clerk

By: /s/ EDWARD J. GUARDARO
EDWARD J. GUARDARO,
Deputy Clerk

OPINION OF THE UNITED STATES TAX COURT

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH, AND DONAL C. O'BRIEN, JR., EXECUTORS, AND MARGARETTA F. ROCKEFELLER, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 4894–82. Filed September 24, 1984.

On Aug. 20, 1974, President Ford nominated Nelson A. Rockefeller to serve as Vice President of the United States pursuant to the 25th Amendment to the United States Constitution. In 1975, Mr. Rockefeller paid expenses in the amount of $550,159.78 incurred in connection with investigations and congressional hearings on the confirmation of his nomination. *Held*, the expenses so incurred and paid by Mr. Rockefeller are not deductible under sec. 162(a) or sec. 162(e), I.R.C. 1954.

Joseph M. Persinger and *Stuart E. Keebler*, for the petitioners.
David M. Brandes, for the respondent.

OPINION

FEATHERSTON, *Judge*: Respondent determined a deficiency in the amount of $44,293 in the Federal income tax of Nelson

A. Rockefeller, deceased, and Margaretta F. Rockefeller for 1975. Petitioners in this proceeding allege that the determination was erroneous and claim an overpayment of income tax in the amount of $355,180 for that year. Other issues having been resolved, the only issue for decision is whether the legal fees and other expenses in the stipulated amount of $550,159.78 incurred and paid by Mr. Rockefeller in connection with his confirmation as Vice President of the United States, are deductible under either section 162(a) or section 162(e).[1]

All of the facts are stipulated.[2]

Petitioners Laurance S. Rockefeller, J. Richardson Dilworth, and Donal C. O'Brien, Jr., are executors of the will of Mr. Rockefeller, who died on January 27, 1979, a resident of Westchester County, NY. Petitioner Margaretta F. Rockefeller was the wife of Mr. Rockefeller both during the period here in controversy and at the time of his death.

When the petition was filed, Laurance A. Rockefeller was a legal resident of Pocantico Hills, NY; J. Richardson Dilworth was a legal resident of Princeton, NJ; Donal C. O'Brien, Jr., was a legal resident of New Canaan, CT; and Mrs. Rockefeller was a legal resident of Pocantico Hills, NY.

The joint income tax return of Mr. and Mrs. Rockefeller for 1975 was timely filed with the Internal Revenue Service Center, Philadelphia, PA. Mr. and Mrs. Rockefeller used a calendar year accounting period and reported their income in accordance with the cash receipts and disbursements method of accounting.

Mr. Rockefeller had a long and distinguished career in public service. Upon the resignation of President Nixon in 1974, Gerald R. Ford, then Vice President, became President, and the Office of Vice President became vacant. On August 20, 1974, President Ford nominated Mr. Rockefeller to serve as the Vice President. The nomination was made pursuant to section 2 of the 25th Amendment to the Constitution of the United States, which provides as follows:

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[1] All section references are to the Internal Revenue Code of 1954 as amended, unless otherwise noted.

[2] This case was submitted to the Court by stipulation on Mar. 19, 1984, and was thereafter briefed by the parties.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Following his nomination, Mr. Rockefeller underwent lengthy and exhaustive investigations and examinations by several Federal agencies and two committees of Congress, the Judiciary Committee of the House of Representatives and the Committee on Rules and Administration of the Senate (the committees). The committees were charged with investigating the credentials, finances, public life, viewpoints on topical issues, and other qualifications of Mr. Rockefeller for the Office of Vice President.

Mr. Rockefeller's nomination as Vice President was confirmed by the U.S. Senate on December 10, 1974, and by the U.S. House of Representatives on December 19, 1974. Mr. Rockefeller was sworn in as Vice President of the United States on December 19, 1974. He served as Vice President until January 20, 1977.

In 1975, Mr. Rockefeller paid expenses in the amount of $550,159.78, all of which were incurred by reason of the investigations, examinations, and hearings in connection with his confirmation as Vice President. The expenses were incurred in responding to numerous requests by Federal agencies and the Congress for documents and information, and in preparing memoranda and testimony for, and in testifying before, the committees. The parties have stipulated that respondent does not contend that the expenses were excessive or unreasonable in relation to the services rendered.

The expenses in the amount of $550,159.78 consisted of the following:

Legal and other professional services	$503,726.89
Travel expenses	17,764.35
Printing of testimony and preparation of charts	2,618.60
Office temporary services	10,224.53
Office rentals[1]	4,442.72
Office machines and furniture rentals	4,180.25
Telephone and telegraph	2,193.55
Transcripts of hearings	3,828.00
Other expenses[2]	1,180.89
Total expenses	550,159.78

[1]Office rentals and office machine and furniture rentals include amounts incurred to furnish separate, secure office facilities required by the Federal Bureau of Investigation, the Internal Revenue Service and Joint Committee on Internal Revenue Taxation, and the General Accounting Office.

[2]Other expenses include working luncheon and supper charges, taxi fares for those working late, delivery and shipping charges, press clipping services, and publications purchased.

Mr. and Mrs. Rockefeller's joint income tax return for 1975 discloses gross income of $4,479,4[illegible], charitable contributions of $1,328,562, and taxable income of $609,131. In addition, the return shows a deduction in the amount of $63,275, an amount equal to his salary as Vice President, for expenses incurred in connection with his confirmation hearings. Among other adjustments, not here in dispute, the notice of deficiency disallowed the deduction of the $63,275 with the following explanation:

> It is determined that the deduction of $63,275.00 shown on your return as expenses in connection with confirmation as Vice President is not deductible because it has not been established that such expense is an ordinary and necessary business expense. Therefore, your taxable income is increased $63,275.

In the petition, petitioners allege that the full amount of $550,159.78 expended in the confirmation proceedings is deductible.

Petitioners contend that Mr. Rockefeller's confirmation hearing expenses are deductible under section 162(a) as ordinary and necessary business expenses. Alternatively, petitioners contend that the expenses are deductible under section 162(e) as ordinary and necessary expenses incurred in carrying on a trade or business in connection with appearances before committees of Congress.

Respondent maintains that the disputed expenses were not ordinary and necessary expenses paid in performing business duties, but were expenses paid in connection with Mr. Rockefeller's efforts to become Vice President of the United States, citing *McDonald v. Commissioner*, 323 U.S. 57 (1944), and its progeny. Alternatively, respondent contends that, because Mr. Rockefeller's expenditures so greatly exceeded the salary that he could earn, a profit motive was lacking and the principle of section 183(b) limiting the deduction to the amount of his salary applies.[3]

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[3]There is no merit in respondent's alternative argument. The Board of Tax Appeals long ago allowed $1-a-year employees of the Government to deduct their actual ordinary and necessary

1. Deductibility of Expenses Paid in Carrying On a Business Under Section 162(a)

Section 162(a)[4] allows a deduction for "ordinary and necessary" expenses paid or incurred in the taxable year in "carrying on any trade or business." Section 7701(a)(26) provides that the term "trade or business" includes "the performance of the functions of a public office." These provisions clearly would allow all of the ordinary and necessary expenses paid by Mr. Rockefeller in carrying on the work of the Office of Vice President. *Frank v. United States*, 577 F.2d 93, 95–96 (9th Cir. 1978); *United States v. LeBlanc*, 278 F.2d 571, 574, 577 (5th Cir. 1960); *Jackling v. Commissioner*, 9 B.T.A. 312, 320 (1927). The expenses paid in connectin with Mr. Rockefeller's confirmation, however, were not incurred in the performance of his Vice Presidential functions; rather, they were incurred in the course of his efforts to attain the Office.

The principles of *McDonald v. Commissioner*, 323 U.S. 57 (1944), control. In that case, a judge was appointed to complete an unexpired term and agreed to become a candidate for the judgeship at the next election. To obtain the support of his party organization, he paid an "assessment" to his party's executive committee, and he incurred campaign expenses for advertising, printing, traveling, and the like. Denying a deduction for these "reelection" expenses, the Supreme Court explained the applicable law and its conclusion as follows (323 U.S. at 59–60):

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" are allowed by * * *

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expenses in carrying out their duties. *Jackling v. Commissioner*, 9 B.T.A. 312 (1927); see also *Pollock v. Commissioner*, 10 B.T.A. 1297 (1928); *Brown v. Commissioner*, 13 B.T.A. 832 (1928). A similar conclusion was reached in *Frank v. United States*, 577 F.2d 93 (9th Cir. 1978), involving the expenses of a Senator's aide. After respondent's opening brief was filed, Rev. Rul. 84–110, 1984–30 I.R.B. 5, was published interpreting sec. 7701(a)(26) to provide an exception to the general profit motive requirement of a trade or business for public officeholders.

[4]SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *

[section 162(a)] as deductions in computing net income. According to tax law terminology * * * [section 7701(a)(26)] the performance by petitioner of his judicial office constituted carrying on a "trade or business" within the terms of * * * [section 162(a)]. He was therefore entitled to deduct from his gross income all the "ordinary and necessary expenses" paid during 1939 in carrying on that "trade or business." He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next 10 years. That is as true of the money he spent more immediately for his own reelection as it is of the "assessment" he paid into the party coffers for the success of his party's ticket. * * *

The *McDonald* opinion thus draws a distinction between expenses incurred in performing the functions of a public office and expenses paid in an effort to obtain the office. The opinion interprets section 162(a) to confine "deductible expenses solely to outlays in the efforts or services * * * from which the income flows." (323 U.S. at 60–61.)

The *McDonald* opinion has been followed to deny election and other related expense deductions in numerous subsequent cases, whether involving election or reelection to public office, and is now deeply ingrained in the tax law. *Shoyer v. United States*, 290 F.2d 817, 818 (3d Cir. 1961); *Maness v. United States*, 367 F.2d 357, 358 (5th Cir. 1966); *Hakim v. Commissioner*, 512 F.2d 1379 (6th Cir. 1975), affg. per curiam a Memorandum Opinion of this Court; *Nichols v. Commissioner*, 511 F.2d 618, 620 (5th Cir. 1975), affg. 60 T.C. 236 (1973); *Levy v. United States*, 210 Ct. Cl. 97, 535 F.2d 47, 49–50 (1976); *Campbell v. Davenport*, 362 F.2d 624, 627 (5th Cir. 1966); *Mays v. Bowers*, 201 F.2d 401, 403 (4th Cir. 1953); *Martino v. Commissioner*, 62 T.C. 840, 844 (1974); see also *Carey v. Commissioner*, 460 F.2d 1259 (4th Cir. 1972), affg. 56 T.C. 477 (1971), involving the election expenses of an officer of a labor union.

We are fully aware, as petitioners emphasize, that the *McDonald* case involved an election, not a nomination-confirmation, and that the opinion may have been influenced by the sensitive policy problems that would arise from allowing deductions for election expenses. See, e.g., *Carey v. Commissioner*, 56 T.C. at 480. As discussed more fully below, however, equally difficult policy problems would arise in attempting to fashion a rule allowing deductions for nomination-confirmation expenses. We are constrained to follow the *McDonald* rule which was succinctly restated in *Diggs v. Commissioner*, 715

F.2d 245, 250 (6th Cir. 1983), affg. in part and revg. in part 76 T.C. 888 (1981), as follows:

> *McDonald* and its progeny explicitly recognize that politicians perform many different functions. Each function, therefore, must be examined to determine whether it is related to the business of *being* an [officeholder] rather than of becoming one. * * *

Under this standard, it is clear that Mr. Rockefeller's expenses incurred in attaining congressional confirmation of his nomination as Vice President are not deductible.

Petitioners attempt to avoid the impact of the *McDonald* opinion by relying upon this Court's opinions in *Primuth v. Commissioner*, 54 T.C. 374 (1970); *Cremona v. Commissioner*, 58 T.C. 219 (1972); and *Black v. Commissioner*, 60 T.C. 108 (1973). In these cases, the Court allowed deductions for job-counseling agency fees incurred by employees in seeking work in their established fields of employment. *Primuth* involved a corporate executive; *Cremona*, a contract administrator; and *Black*, a corporation comptroller. In these cases, the Court held that employment agency fees paid in seeking new employment or a better job in a taxpayer's established field of work were incurred in carrying on his trade or business.

The phrase "trade or business," however, presupposes an existing business. *Stanton v. Commissioner*, 399 F.2d 326, 329 (5th Cir. 1968), affg. a Memorandum Opinion of this Court; *Koons v. Commissioner*, 35 T.C. 1092, 1101 (1961); *Frank v. Commissioner*, 20 T.C. 511, 514 (1953). Where the taxpayer pays employment agency fees or incurs other expenses in seeking to move to a new job in a different field of employment, the fees are not deductible. *Carter v. Commissioner*, 51 T.C. 932, 934 (1969).[5]

Attempting to show that Mr. Rockefeller's confirmation expenses were incurred in an existing business, petitioners argue that he was in the business of holding public offices. Petitioners point to Mr. Rockefeller's long and distinguished career of holding public offices which began, according to his statement filed with the House Judiciary Committee, as early as 1930 with the Westchester County Board of Health. He held positions with the Federal Government which included Coordi-

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[5] See also *Evans v. Commissioner*, T.C. Memo. 1981-413.

nator of Inter-American Affairs (1940–44), Assistant Secretary of State for American Republic Affairs (1944–45), Chairman of the Presidential Advisory Board on International Development (1950–51), Undersecretary of Health, Education and Welfare (1953–54), and Special Assistant to the President for International Affairs (1954–55). He served as Governor of New York (1958–73), and held the chairmanships of the two commissions, the Commission on Critical Choices for Americans and the National Commission on Water Quality[6] (1973–74), at the time of his nomination. Petitioners argue that under the *Primuth* line of cases, Mr. Rockefeller's confirmation expenses are deductible because the Office of Vice President was in his established field of the business of holding public offices. We do not agree.

We think that holding public offices is too amorphous a description to constitute a single trade or business within the *Primuth* principle. Public offices differ widely with respect to duties, responsibilities, tasks, and activities.[7] In Mr. Rockefeller's own career, his offices ranged from membership on a county commission to the Vice Presidency of the United States. As indicated above, some of his positions were with the Government of the State of New York; some were with the Federal Government. Each term as Governor of New York required a separate election. Each of his Federal Government positions required a separate appointment; at least two of them required Senate confirmation. There was no necessary relationship between the duties he performed in any two of the positions. Such private sector positions as corporate executive (*Primuth*), contract administrator (*Cremona*), and corporation comptroller (*Black*) are simply not analogous to the variety of

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[6]Petitioners recognize that there is a question whether the chairmanship of these two commissions meets the definition of a public office laid down in *Frank v. United States*, 577 F.2d 93, 96 (9th Cir. 1978); *Green v. Bookwalter*, 207 F. Supp. 866, 873–874 (W.D. Mo. 1962), affd. 319 F.2d 631 (8th Cir. 1963), but argue that, in any event, Mr. Rockefeller had not lost his status, established over three decades, of being engaged in the trade or business of holding public offices. We need not deal with that issue.

[7]In *Davis v. Commissioner*, 65 T.C. 1014, 1019 (1976), the Court, in deciding whether an educational expenditure qualified the taxpayer for a "new trade or business" under the sec. 162(a) education expense regulations (sec. 1.162-5(b)(2), Income Tax Regs.), said:

"This Court has adopted a "commonsense approach" when we have been required to decide whether an educational expenditure qualified a taxpayer for a "new trade or business," and hence was nondeductible. * * * If substantial differences exist in the tasks and activities of various occupations or employments, then each such occupation or employment constitutes a separate trade or business. * * *"

public offices which Mr. Rockefeller held. Obtaining reemployment in such private sector positions involves considerations far different from receiving the nomination and obtaining confirmation under the 25th Amendment to serve as Vice President of the United States.

Indeed, the Office of Vice President is a unique position, political in nature, established by the Constitution of the United States, with vastly different tasks, activities, and responsibilities from the offices previously held by Mr. Rockefeller. The Vice President stands by to succeed the President in case of death, resignation, or removal from office (U.S. Const. art. II, sec. 1; amend. XXV, sec. 1). He holds the position of President of the Senate (U.S. Const. art. I, sec. 3) and serves as alter ego for the President of the United States on many occasions. In addition, the Vice President has, in recent years, carried a heavy load of responsibilities in the administration of the executive branch of the Government.[8]

In adopting the Joint Resolution leading to the 25th Amendment, the Congress recognized the essentially political nature of the Vice Presidential nomination-confirmation process. The reports of both the Senate and House committees contain the following similar paragraphs on section 2 dealing with filling a vacancy in the Office of Vice President:

> Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he had been confirmed by a majority vote in both Houses of the Congress. [S. Rept. 66, 89th Cong., 1st Sess. 14–15 (1965).]

> It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible

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[8] In explaining the Joint Resolution which led to the 25th Amendment, the accompanying reports dealing with sec. 2 include the following:

"In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson."

H. Rept. 203, to accompany H.J. Res. 1, 89th Cong., 1st Sess. 14–15 (1965); S. Rept. 66, to accompany S.J. Res. 1, 89th Cong., 1st Sess. 14 (1965).

with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President. [H. Rept. 203, 89th Cong., 1st Sess. 14–15 (1965).]

The assurance in these reports that the appointed Vice President will be of the same political party as the President, and the comparison of the Presidential candidate's voice in the selection of the Vice Presidential candidate "subject to convention approval" with the President's choice of his Vice President "subject to congressional approval" serve to underline the political nature of the appointment-confirmation process.

Consistent with this concept of the nomination-confirmation process, the Senate committee report recommending Mr. Rockefeller's confirmation refers to the responsibility imposed by the 25th Amendment as "substituting Congressional judgment for the usual national elective process." The hearings on the nomination, some of which were televised, disclose that Mr. Rockefeller was examined, and other witnesses testified, as to his record and views on virtually every domestic and foreign policy issue then current in the political world. The committee reports refer to editorials on the hearings and include numerous statements and letters pro and con on the nomination. The public perception created by the hearings obviously played a part in the final decision on Mr. Rockefeller's nomination to this political office.

To conclude that holding a series of public offices, including that of Vice President of the United States, is a single trade or business would raise other policy problems equally as difficult as the ones acknowledged in the *McDonald* opinion. It would mean that professional politicians or perennial office seekers would be entitled to deduct Senate or congressional confirmation expenses, whereas individuals appointed from the private sector would not. If deductions are to be allowed for expenses incurred in attaining congressional confirmation for public offices, it would appear that expenditures incurred in attaining nomination to such offices would likewise be deductible. If office seeking by a professional politician is part of the business of carrying on an office, it would appear that

expenses incurred for self promotion or "political self-aggrandizement" (*Diggs v. Commissioner*, 715 F.2d at 251)[9] in order to call himself to the attention of the appointing and confirming authorities, would also be deductible. Such expenses could span a career, and could include unsuccessful as well as successful attempts to obtain nominations or congressional confirmations. At given times, the most essential of such expenses may involve attendance at political conventions or political party contributions made as evidence of "party allegiance mixed or unmixed by a lively sense of future favor." *McDonald v. Commissioner, supra* at 60. The extent to which tax-deductible dollars are to be spent in attaining nominations and congressional confirmations is a policy issue which should be decided by Congress, not the courts. As the law now stands, the courts have no guidance on where to draw the line. Not until Congress provides that guidance should the courts sanction the allowance of deductions for expenses incurred in attaining public office. Cf. *Mays v. Bowers*, 201 F.2d at 403.

In the absence of any clear congressional mandate to the contrary, we join the Court in *Diggs v. Commissioner, supra* at 251, in rejecting "the analogy between seeking new employment and seeking new political office." We think the intent of the law as it now stands is served by the language of section 7701(a)(26): "The term 'trade or business' includes the performance of the functions of a public office." The section does not make the performance of the functions of a series of public offices a single trade or business. Rather, the performance of the functions of each public office is a trade or business. Accordingly, section 162(a), which authorizes deductions for carrying on a trade or business, does not support the deduction of Mr. Rockefeller's expenses in attaining confirmation as Vice President.

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[9] In *Diggs v. Commissioner*, 715 F.2d 245, 253 (6th Cir. 1983), the Court held that a Congressman's expenses of attending a national political convention were not deductible, affg. on this issue 76 T.C. 888 (1981), because they were connected with his personal and party aggrandizement and "were not so directly connected with his trade or business as a legislator as to qualify for a sec. 162 deduction."

2. Section 162(e) Relating to Appearances With Respect to Legislation

Petitioners argue, alternatively, that section 162(e)[10] "explicitly allows deduction of the confirmation expenses." That section provides that the deduction allowed by subsection (a), which we have discussed above, shall include all the ordinary and necessary expenses paid or incurred during the taxable year "in carrying on any trade or business" in direct connection with appearances before legislative committees. The section excludes from its reach participation in any political campaign and any attempt to influence the general public on legislative matters, elections, or referendums.

We do not think section 162(e) aids petitioners' cause. The legislative history of that section (added by the Revenue Act of 1962, Pub. L. 87–834, sec. 3(a), 76 Stat. 973, effective for taxable years beginning after Dec. 31, 1962) reveals that it was enacted in response to regulations adopted in 1959 following the Supreme Court's decision in *Cammarano v. United States*, and *F. Strauss & Sons, Inc. v. Commissioner*, 358 U.S. 498 (1959).[11] H. Rept. 1447, to accompany H.R. 10650, 87th Cong., 2d Sess. (1962), 1962–3 C.B. 402, 420–422; S. Rept. 1881, 87th Cong., 2d Sess. (1962), 1962–3 C.B. 703, 727–730. The Senate committee report (1962–3 C.B. at 727–728) describes the *Cammarano* decision as follows:

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[10] SEC. 162. TRADE OR BUSINESS EXPENSES.

(e) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.—

(1) IN GENERAL.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, • • •

* * * * * * *

(2) LIMITATION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

[11] See *Diggs v. Commissioner*, 76 T.C. 888, 893–895 (1981), affd. in part and revd. in part 715 F.2d 245, 248–249 (6th Cir. 1983); *Jordan v. Commissioner*, 60 T.C. 770, 772–774 (1973).

The Court held that although the amounts expended for legislative matters were "ordinary and necessary"—in fact essential to the very survival of the taxpayer's business—nevertheless they were not deductible because the regulations barred the deduction of this particular type of expense.

Pointing out the anomaly that expenses in connection with appearances before the judicial and executive branches of the Government were deductible "where the expenses otherwise qualify as trade or business expenses," the Congress decided "to place presentations to the legislative branch of government on substantially the same footing in this respect as that with the other two coordinate branches of government." H. Rept. 1447, *supra*, 1962–3 C.B. at 421.[12]

We think it apparent from the language of section 162(e) as well as the legislative history of the section that it is wholly inapplicable to Mr. Rockefeller's expenses in attaining confirmation by Congress of his nomination as Vice President; it applies only where the taxpayer is already engaged in the business in which the expenses are incurred. By its express language, the section applies only to expenses "paid or incurred during the taxable year in carrying on any trade or business." The committee reports, accompanying the enactment of the section, described above, show that the section was intended to authorize deductions which "otherwise qualify as trade or business expenses." The regulations explain that the section allows deductions for lobbying expenses with respect to specific legislative proposals "if they otherwise meet the requirements of the regulations under section 162." Sec. 1.162–20(c)(1), Income Tax Regs. Further, the courts have pointed out that the section allows deductions only "if they are

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[12]The report explains the provision as follows:

"The expenses which may be deducted are divided into two categories. The first category relates to expenses in direct connection with appearances, submission of statements or sending of communications. These appearances, statements or communications may be presented either to committees or individual Members of Congress or to committees or individual members of State or local governmental legislatures. The second category of expenses which may be deducted are those in direct connection with the communication of information between the taxpayer and an organization of which he is a member. This communication of information may be either from the organization to the taxpayer or vice versa. In the case of both categories of expenses referred to above, in order for the expense item to be deductible, it must be concerned with legislation or proposed legislation of direct interest to the taxpayer (and to the organization in the latter case). Thus, the expenses may not be in connection with legislative matters such as nominations, etc., but rather must be in connection with specific legislation or proposals for legislation."

H. Rept. 1447, to accompany H.R. 10650, 87th Cong., 2d Sess. (1962), 1962–3 C.B. 402, 422.

incurred in 'carrying on a trade or business,' " holding that the purchase and sale of stock "do not rise to the level of a 'trade or business.' " *Purvis v. Commissioner*, 530 F.2d 1332, 1334 (9th Cir. 1976), affg. a Memorandum Opinion of this Court.

Thus, section 162(e) imposes the same condition to deductibility as does section 162(a), i.e., that the expenses sought to be deducted must be incurred or paid in carrying on a trade or business. We have concluded above that Mr. Rockefeller's holding of a series of public offices during his long and distinguished career did not constitute a single trade or business; the performance of the functions of each public office was a separate business. We have also concluded that his congressional confirmation expenses were not incurred in carrying on the performance of the functions of the Office of the Vice President, but in seeking to attain that Office. Mr. Rockefeller's expenses in connection with the hearings are not, therefore, deductible under section 162(e).[13]

To reflect the foregoing,

Decision will be entered for the respondent.

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[13] The last sentence of the quotation from H. Rept. 1447, to accompany H.R. 10650, 87th Cong., 2d Sess. (1962), 1962-3 C.B. 405, 422, in note 12 *supra*, states that expenses, in order to be deductible, "may not be in connection with legislative matters such as nominations." Petitioners argue elaborately that this sentence was not intended to refer to a taxpayer's own nomination to office. This interpretation appears to be reasonable, but it merely points up the fact that sec. 162(e) has nothing to do with the issue here presented; the section authorizes deductions for lobbying undertaken in "carrying on" an existing trade or business, not one that the taxpayer wishes to enter.

DECISION OF THE UNITED STATES TAX COURT

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH AND DONAL C. O'BRIEN, JR., EXECUTORS, AND MARGARETTA F. ROCKEFELLER,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 4894-82.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed September 24, 1984, it is

ORDERED AND DECIDED: There is a deficiency in the amount of $44,293 in petitioners' Federal income tax for 1975.

/s/ C. MOXLEY FEATHERSTON
C. MOXLEY FEATHERSTON
Judge

Entered: September 27, 1984

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-307

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
RICHARD FARBER
BRUCE R. ELLISEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether expenses incurred by a taxpayer in connection with his confirmation as a nominee for executive public office are deductible as "ordinary and necessary expenses paid or incurred * * * in carrying on [a] trade or business" (I.R.C. § 162(a)), where the taxpayer is not in the business of being a government executive at the time of his nomination, and where the office that he seeks differs substantially from the offices that he has previously held.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-307

ESTATE OF NELSON A. ROCKEFELLER, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 762 F.2d 264. The opinion of the Tax Court (Pet. App. 19-32) is reported at 83 T.C. 368.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1985. The petition for a writ of certiorari was filed on August 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nelson A. Rockefeller was elected Governor of New York in 1958. He served in that office until 1973, when he resigned. He resigned the governorship in order to devote his full time to the chairmanships of two commissions, the Commission on Critical Choices for Americans and the

National Commission on Water Quality (Pet. App. 3, 13). He performed no executive duties on those commissions, where he served on a volunteer basis (*id.* at 13; Pet. 3).

Upon the resignation of President Nixon in 1974, Vice President Ford became President. On August 20, 1974, President Ford, pursuant to the Twenty-fifth Amendment, nominated Mr. Rockefeller to serve as Vice President (Pet. App. 20). Following his nomination, Mr. Rockefeller underwent lengthy and exhaustive investigations by several federal agencies, the House Judiciary Committee, and the Senate Rules Committee. The Committees were charged with investigating his qualifications for the office of Vice President, including his viewpoints on public issues, his prior public service, and his personal finances (*id.* at 21). Mr. Rockefeller's nomination was duly confirmed by the House and the Senate, and he was sworn in as Vice President on December 19, 1974 (*ibid.*).

Mr. Rockefeller incurred expenses of approximately $550,000 in connection with his confirmation as Vice President. These expenses, which were primarily for legal and other professional services, were incurred in responding to requests by government investigators for documents and information, preparing memoranda and testimony for the congressional Committees, and testifying before those Committees (Pet. App. 2, 21). Petitioners[1] sought to deduct these costs pursuant to Section 162(a) of the Internal Revenue Code[2] as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on [a] trade or

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[1]Petitioners are the executors of Mr. Rockefeller's estate and his widow, with whom he filed a joint federal income tax return for the year at issue.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the period at issue (the Code or I.R.C.).

business." The Commissioner disallowed the deductions, and petitioners sought redetermination of the resulting deficiency in the Tax Court (Pet. App. 2-3, 22).

The Tax Court held that Mr. Rockefeller's confirmation expenses were not deductible under Section 162(a). It viewed the case as "control[led]" (Pet. App. 23-25) by the principles of *McDonald* v. *Commissioner*, 323 U.S. 57 (1944). This Court there held that expenses incurred by a taxpayer in seeking election to public office are not deductible as ordinary and necessary business expenses. The Tax Court also concluded that Mr. Rockefeller's confirmation expenses could not be deducted on the theory that he had incurred them to obtain a new position within his *existing* trade or business, which petitioners described as "the business of holding public offices" (Pet. App. 26). The court found that description "too amorphous" to constitute the definition of a single "trade or business" for tax purposes (*ibid.*). Rather, the court concluded that the office of Vice President was a different trade or business from those in which Mr. Rockefeller had earlier been engaged, reasoning that the Vice Presidency is "a unique position * * * with vastly different tasks, activities, and responsibilities from the offices previously held by Mr. Rockefeller" (*id.* at 27). The Tax Court noted the well-settled rule that the expenses of seeking employment in a new trade or business are not deductible (*id.* at 25).

The court of appeals unanimously affirmed (Pet. App. 1-17). Although it departed in some respects from the Tax Court's analysis, it agreed with the Tax Court's conclusion that Mr. Rockefeller was not engaged in any trade or business comparable to the Vice Presidency when he incurred his confirmation costs. It rejected petitioners' argument that Mr. Rockefeller at the time of his nomination was carrying on the trade or business of being a "governmental executive," pointing out that he held no executive public office at

that time, and noting the absence of any evidence to suggest that, when he resigned as Governor of New York, he intended ever to hold executive public office again (*id.* at 13-14). The court of appeals also agreed with the Tax Court's conclusion that being Governor of New York and being Vice President of the United States "are not the same trade or business in the narrow sense in which sameness has been consistently characterized" by courts interpreting Section 162(a) (Pet. App. 15). It noted that the two offices entail substantially different duties and responsibilities, and concluded that it was not "free to disturb" the Tax Court's finding in this respect (*ibid.*). Since the court of appeals based its holding on general tax principles that bar the deduction of expenses incurred in seeking new employment, it found no need to decide whether this Court's decision in *McDonald* would independently prohibit, in circumstances where the taxpayer's current and former positions are substantially identical, deductions for expenses incurred in seeking appointive as well as elective public office (Pet. App. 16-17).

ARGUMENT

The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. That question is essentially factual and warrants no further review.

1. Section 162(a) of the Code allows a deduction for "ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business." Section 7701(a)(26) provides that the term "trade or business" includes the performance of the functions of a public office. As the courts below noted (Pet. App. 16, 23), ordinary and necessary expenses incurred by Mr. Rockefeller in performing his duties as Vice President would, of course, be deductible under Section 162(a). But the confirmation expenses at issue here were not incurred in the performance of the functions

of the office of Vice President. Rather, they were incurred in the course of Mr. Rockefeller's efforts to attain that office.

Expenses incurred in seeking a new job within a taxpayer's existing trade or business are generally deductible under Section 162(a) as expenses of "carrying on" that business. *Primuth* v. *Commissioner,* 54 T.C. 374, 377-379 (1970); *Cremona* v. *Commissioner,* 58 T.C. 219, 221-222 (1972); Rev. Rul. 75-120, 1975-1 C.B. 55. Expenses incurred in seeking a job in a new and different trade or business, by contrast, are not deductible. *Carter* v. *Commissioner,* 51 T.C. 932, 934 (1969); Rev. Rul. 75-120, *supra.* The courts below correctly held that Mr. Rockefeller's confirmation expenses were of the latter sort.

First, even if petitioners are correct in their contention that being a "governmental executive" (Pet. App. 10) constitutes a cognizable "trade or business" for purposes of Section 162(a), Mr. Rockefeller was not carrying on that trade or business at the time of his nomination. The only public positions he held at that time were the chairmanships of the National Commission on Water Quality and the Commission on Critical Choices for Americans, positions in which he had no executive duties (Pet. App. 13). As the court of appeals observed (*ibid.*), holding the chairs of these two Commissions and being Vice President are plainly distinct trades or businesses. It is of course true that Mr. Rockefeller, prior to his resignation as Governor of New York in December 1973, had served as a "governmental executive," and it is also true that a taxpayer who has left one job and not yet taken another may be viewed as still engaged in the business of providing the type of services he formerly performed. But a taxpayer may take advantage of this "hiatus" principle only if there is substantial continuity between his past and present employment, and to demonstrate such continuity "a taxpayer must at least show that during the hiatus he intended to resume the same trade or business"

(Pet. App. 14). See *Haft* v. *Commissioner*, 40 T.C. 2, 6 (1963); *Sherman* v. *Commissioner*, 36 T.C.M. (CCH) 1191, 1193 (1977); Rev. Rul. 75-120, *supra*. The court of appeals correctly concluded that petitioners had made no such showing here (Pet. App. 14). Mr. Rockefeller resigned the governorship to devote his full time to volunteer service on his commissions, and there is nothing in the record to suggest that he was then contemplating holding executive public office again. The vacancy in the office of Vice President was not foreseeable until shortly before it occurred.

Secondly, even if one were to ignore the eight-month gap in Mr. Rockefeller's career as a "governmental executive," petitioners would still not be entitled to prevail, since, as both courts below correctly held, being a governor and being Vice President are not the same "trade or business" (Pet. App. 14-15, 27). If substantial differences exist in the tasks and activities that two positions entail, each constitutes a distinct "trade or business." See *Davis* v. *Commissioner*, 65 T.C. 1014, 1019 (1976); *Glenn* v. *Commissioner*, 62 T.C. 270, 275 (1974). The courts, moreover, have insisted upon a "high degree of identity" (Pet. App. 10) in this respect. See, *e.g.*, *Vetrick* v. *Commissioner*, 628 F.2d 885, 886-887 (5th Cir. 1980); *Sharon* v. *Commissioner*, 591 F.2d 1273, 1275 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979); *Glenn* v. *Commissioner*, 62 T.C. at 275. As the court of appeals properly noted here, a governorship entails many duties and activities that find no counterpart in the Vice Presidency, and vice versa (Pet. App. 15). Indeed, the office of Vice President is a unique position, in part because the Vice President's most important task is "readying himself for the possibility of assuming the Presidency on a moment's notice" (*ibid.*). In any event, the determination whether two positions are sufficiently "identical" for purposes of Section 162(a) is essentially factual (see Pet. App. 15), and the resolution of that question by the courts below warrants no further review.

2. There is no merit to petitioners' contention (Pet. 12-14) that the decision below conflicts with this Court's decision in *McDonald* v. *Commissioner, supra.* The Court there held that campaign expenses incurred by a judge seeking reelection are not deductible as business expenses under Section 162(a). Obviously, there is no conflict between that holding and the holding below; quite the contrary, the Tax Court not implausibly relied on *McDonald* in support of its result.

Nor is there any merit to petitioners' broader contention (Pet. 13) that the decisions below "deny to Mr. Rockefeller and all other public officials a class of deductions allowed to employees in the private sector," in asserted conflict with Section 7701(a)(26) and principles that petitioners seek to draw from *McDonald.* The court of appeals did not rely either on *McDonald* or on Section 7701(a)(26). Rather, it applied to Mr. Rockefeller the same rules of general tax law that are applicable to employees in the private sector, comparing Mr. Rockefeller's old job with his new one and finding them so dissimilar as to constitute discrete trades or businesses. The "issues of wide-ranging impact" (Pet. 6) to which petitioners devote the bulk of their discussion are issues that the court of appeals found it unnecessary to reach. This case presents no occasion for this Court to address questions that the court of appeals correctly concluded that it was not required to decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
RICHARD FARBER
BRUCE R. ELLISEN
Attorneys

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No. 85-307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Estate of NELSON A. ROCKEFELLER, Deceased, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH and DONAL C. O'BRIEN, JR., Executors, and MARGARETTA F. ROCKEFELLER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000
Counsel for Petitioners

Of Counsel:
STUART E. KEEBLER
JOSEPH M. PERSINGER
JAMES EDWARD CLAPP
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, New York 10005

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REPLY BRIEF FOR PETITIONERS

The Commissioner does not deny that this case involves fundamental questions of far-reaching significance (Pet. 6-8). He argues that the case was correctly decided (Brief in Opposition at 4-6), and that it is unnecessary to consider whether the decision below is consistent with the mandate of Congress in I.R.C. § 7701(a)(26) and the teaching of this Court in *McDonald* v. *Commissioner*, 323 U.S. 57 (1944). (Brief in Opposition at 7.)

ARGUMENT

1. The decision below is said to be correct, first, because of the eight-month hiatus between Mr. Rockefeller's service as Governor and his nomination as Vice President. The Commissioner seizes upon a novel theory announced by the Court below: that a brief hiatus in a taxpayer's long-standing career,

followed immediately by a resumption of that career, terminates the taxpayer's trade or business and deprives him of the customary deduction for expenses incurred in securing the new position, unless he makes an affirmative showing "that during the hiatus he intended to resume the same trade or business." (Pet. App. 14; Brief in Opposition at 5.)

This has never been the law. The authorities cited for this proposition (Brief in Opposition at 6) do not support it. Such a showing is needed when a taxpayer leaves his trade or business "for a prolonged period." *Sherman* v. *Commissioner*, 36 T.C.M. (CCH) 1191, 1193 (1977) (citing cases where the hiatus lasted four or more years). But as the Commissioner himself has stated, so long as no such "substantial lack of continuity occurred between the time of the past employment and the seeking of the new employment," the taxpayer's trade or business during the hiatus "would consist of the services previously performed for his past employer." Rev. Rul. 75-120, 1975-1 C.B. 55, 56; *see also* Pet. App. 14. Thus, under the Commissioner's own ruling, Mr. Rockefeller's eight-month period of volunteer service on two national commissions, which kept him visible and available for the opportunity that soon came along to continue his life-long career as an executive in state and federal government, did not terminate his trade or business of being a governmental executive.

The decision below is also said to be correct because the positions of chief executive of a state and vice-chief-executive of the country are claimed to be different trades or businesses. But this conclusion can only be reached by applying different standards to officers in the public and private sectors. Under *Primuth* v. *Commissioner*, 54 T.C. 374, 379 (1970); *acq.*, 1972-2 C.B. 2, different executive positions in the corporate sphere are within the same "trade or business of being a corporate executive," whereas under the Tax Court ruling affirmed by the Court below, different positions as a governmental executive are regarded as different trades or businesses by definition. This misreading of the pertinent definitional section of the Internal Revenue Code—Section 7701(a)(26)—is discriminatory and contrary to the intent of Congress.

2. The Commissioner argues that there is no need to correct this misreading of the Code, and no need to remedy the conflict between the decision below and the principle of equal treatment for public and private employees endorsed by this Court in *McDonald* v. *Commissioner, supra* (Pet. 13), because "[t]he court of appeals did not rely either on *McDonald* or on Section 7701(a)(26)." (Brief in Opposition at 7.) But this disregard by the Court below of the controlling statute and the pertinent ruling of this Court is precisely the error that requires review and remedy by this Court.

CONCLUSION

The decision below is incorrect. In view of the importance and widespread impact of that decision (Pet. 6-8), and its inconsistency with the intent of Congress (Pet. 8-12) and with this Court's opinion in *McDonald* (Pet. 12-14), certiorari should be granted.

Respectfully submitted,

WILLIAM ELDRED JACKSON
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000
Counsel for Petitioners

Of Counsel:

STUART E. KEEBLER
JOSEPH M. PERSINGER
JAMES EDWARD CLAPP
MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, New York 10005

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